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Supreme Court of the United States

OCTOBER TERM, 1952

No. 296

ALSTATE CONSTRUCTION COMPANY,
PETITIONER,

vs.

MAURICE J. TOBIN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED AUGUST 27, 1952

CERTIORARI GRANTED DECEMBER 8, 1952

SUPREME COURT OF THE UNITED STATES

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[fol. a]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM R. MCCOMB, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff

v.

ALSTATE CONSTRUCTION COMPANY, Defendant

COMPLAINT—Filed June 18, 1948

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201, *et seq.*), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant is, and at all times since April 1, 1946, was, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, having its principal office and place of business at 313 Chestnut Street, Harrisburg, Dauphin County, Pennsylvania, and branch establishments located at R. D. #3, Hanover, Adams County, Pennsylvania; at Sillyman Street, Cressona, Schuylkill County, Pennsylvania, and at Negany, Mifflin County, Pennsylvania, each within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, [fol. b] engaged in the production, sale, distribution and further application of bituminous concrete materials for use by interstate railroads and other industrial, commercial, and private customers and for use in the construction, reconstruction, repair, and maintenance of interstate highways and other instrumentalities of interstate commerce for and by the Commonwealth of Pennsylvania and numerous political subdivisions thereof.

IV

At all times hereinafter mentioned, defendant employed and is employing approximately 38 employees in the aforesaid places of business where they are engaged in interstate commerce and in the production of goods for interstate commerce as described in paragraph III hereof and in processes or occupations necessary to such production. All of the duties performed by said employees are necessary and essential to the operation and maintenance of essential instrumentalities of interstate commerce and are an essential and integral part of interstate commerce.

V

Defendant has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many of its employees in interstate commerce and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty (40) hours since October 24, 1940, without compensating these employees for their employment in excess of forty (40) hours, in workweeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pur- [fol. c] suant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act, in that since

October 24, 1945, it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek with respect to many of its employees.

VIII

Defendant has, since the effective date thereof, repeatedly violated and is continuing to violate the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment preliminarily during the pendency of this action and permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, [fol. d] from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

William S. Tyson, Solicitor, Ernest N. Votaw, Regional Attorney, Louis Weiner, Senior Attorney, United States Department of Labor.

Post Office Address: c/o Solicitor of Labor, U. S. Department of Labor, 1216 Widener Building, Philadelphia 7, Pennsylvania, or c/o United States Attorney, Room 424, Post Office Building, Scranton, Pennsylvania, or c/o Solicitor of Labor, U. S. Department of Labor, Washington 25, D. C.

[fol. e] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted]

DEFENDANT'S ANSWER—Filed July 16, 1948

Alstate Construction Comany, the defendant in the above civil action, in answer to the specific averments of the complaint, sets forth:

1. Defendant, for the reasons hereinafter stated, denies that the District Court has jurisdiction over the action.

2. Defendant denies that any of its employees are engaged in interstate commerce or in the production of goods for interstate commerce, or that they are so closely connected with commerce or transportation as to be a part of it within the meaning of the Act.

3. Defendant denies that its operations are as set forth in paragraph III of the complaint, and, on the other hand, avers that it is engaged solely in the production and sale of bituminous concrete materials in intrastate commerce.

4. Defendant denies that it has violated or is violating the provisions of Sections 7 and 15(a)(2) of the Fair Labor Standards Act of 1938 (act of June 25, 1938, see 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201, et seq., hereinafter called the Act) for the reason that its em- [fol. f] ployees are engaged neither in interstate commerce nor in the production of goods for interstate commerce.

5. Defendant denies that it has violated or is violating the provisions of Section 11(c) and 15(a)(5) of the Act by failing to make, keep and preserve certain records, as alleged by the complainant, for the reason that it is not subject to the provisions of said Act.

6. Defendant denies that it has violated or is continuing to violate any provision of said Act, and alleges that its employees are engaged solely in intrastate commerce and neither the defendant nor its employees are in any way subject to the provisions of said Act.

7. Defendant specifically denies the allegations contained in paragraphs II, III, IV, V, VII and VIII of the complaint.

Wherefore, defendant prays that complainants request for a judgment preliminarily during the pendency of this action and permanently thereafter be denied.

Gilbert Nurick, State Street Building, Harrisburg, Pa., Samuel A. Schreckengaust, Jr., State Street Building, Harrisburg, Pa., McNees, Wallace & Nurick, State Street Building, Harrisburg, Pa., Attorneys for Defendant.

[fol. 1] IN UNITED STATES DISTRICT COURT

Appendix to Appellant's Brief

I

Docket Entries

1948

June 18, Complaint.

June 18, Motion for a preliminary injunction.

June 18, Order that the defendant Alstate Construction Company show cause on the 16th day of July, 1948, at Harrisburg, Pa., if any it can, why a preliminary injunction should not issue. ( ) Copy of complaint, summons and copy, copy of motion and order handed U. S. Marshal.

June 18, J. S. 5.

June 22, Summons returned served 6-21-48, also copy of complaint, motion and Rule to Show Cause. (M. F. & E. $2.26.)

July 16, Answer of defendant.

Dec. 2, Praecipe to place case on trial list for the January Term 1949, at Lewisburg, Pa.

1949

Jan. 17, Stipulation of counsel determining certain pertinent facts.

Jan. 17, Pre-Trial conference.

Jan. 17, Order continuing case to 2-21-49, at 10:00 a. m., at Harrisburg- Pa. (F.) Copies mailed counsel of record.

[fol. 2] Feb. 8, Order continuing case to March 1, 1949,

1949

10:00 a. m., at Harrisburg, Pa. (F.) Copies mailed counsel of record.

Mar. 1, Clerk's minutes, case continued after the taking of some additional testimony.

Mar. 15, Supplemental Stipulation of counsel determining certain pertinent facts.

Mar. 29, Plaintiff's exhibits 1 and 3.

June 14, Order directing transcript of hearings be filed. (F.)

June 14, Transcript of March 1, 1949. Filed.

Oct. 22, Praecipe to place case on the Trial List for the November Term 1949, at Harrisburg, Pa.

Nov. 28, Order continuing case to Thursday, Dec. 15, 1949, at 11:00 a. m., at Lewisburg, Pa. (F. V. F.) Copies of above order mailed to counsel of record.

Dec. 13, Plaintiff's requests for Findings of Fact and Conclusions of Law.

Dec. 15, Clerk's minutes of Arguments before Judge Follmer.

1950

June 7, Stipulation of counsel that Maurice J. Tobin, Sec. of Labor, be substituted as party plaintiff, and Order allowing substitution of party plaintiff. (M.) Copies of order mailed counsel of record.

Aug. 25, Copy of clerk's letter advising counsel that additional arguments will be heard 9-12-50 at Harrisburg, Pa., at 10:00 a. m.

Sept. 12, Clerk's Minute sheet of further arguments before Judge Follmer. Decision to be handed down.

[fol. 3] Sept. 12, Defendant's requests for Findings of Fact and Conclusions of Law.

1951

Feb. 6, Additional stipulation determining certain pertinent facts.

Feb. 23, Opinion—the plaintiff is entitled to an injunction as prayed for. (F.) Copies of opinion mailed counsel of record, and the Attorney General.

Feb. 28, Motion for re-argument and re-consideration.

1951

Feb. 28, Clerk's Minute Sheet of Argument on Motion for re-argument and re-consideration before Julge Follmer at Harrisburg, Penna.

Mar. 30, Order of Court that the Opinion as originally filed calls for no modification, defendant's motion for re-consideration is refused and Judgment in accordance with the Opinion filed 2-23-51, will be filed this date. (F.) Copies of Order filed this date, mailed to counsel of record.

Mar. 30, Judgment of a permanent injunction restraining defendant from violating the provisions of Section 16 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938. Copies of Judgment filed March 30, 1951, mailed counsel of record.

Mar. 30, J. S. 6.

Apr. 25, Notice of Appeal.

Apr. 25, Copies of Notice of Appeal mailed U. S. Court of Appeals and Counsel for Plaintiff.

Apr. 25, Check in the sum of $250.00 deposited in the Registry Fund in lieu of Appeal Bond (P. 930).

Apr. 27, Receipt for notice of appeal from U. S. Court of Appeals.

[fol. 4] IN UNITED STATES DISTRICT COURT

OPINION—Filed February 23, 1951

This action was brought by William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff, under the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat, 1060, 29 U. S. C. § 201, et seq.) to enjoin defendant, Alstate Construction Company, a Pennsylvania corporation, from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Act 29 U. S. C. § 215 (a) (2, 5). Subsequently, by Stipulation, Maurice J. Tobin, Secretary of the United States Department of Labor, was substituted as party plaintiff.

The facts of the case are contained in a Stipulation and Supplemental Stipulations of Facts, further supple-

mented by certain additional testimony taken in open court by the plaintiff, all of which may be summarized and condensed as follows:

Defendant is engaged in the production, sale, distribution and further application of a bituminous concrete material, known as amesite. Its operations are wholly in Pennsylvania, where its material is processed at its three seperate plants, namely, Hanover in Adams County, Cressona in Schuylkill County, and Naginey in Mifflin County. [fol. 5] Amesite consists of the following ingredients: limestone, naphtha, asphalt filler and lime, all of which is quarried or manufactured and purchased in Pennsylvania with the exception that about eight thousand gallons of asphalt are received from a refinery in Baltimore, Maryland, and pumped from railroad tank cars into defendant's storage tanks each week at the Hanover plant. The operation of receiving, handling and pumping the asphalt takes from four to five hours and is performed by any employee available at the time.

The said bituminous concrete materials, known also, as HE, a cold mix and ID2, a hot mix, otherwise known as macadam blacktop, are primarily marketed by defendant as follows:

(1) Contracts with the Commonwealth of Pennsylvania and many of its political subdivisions, for the sale of material and for material and labor for constructing, reconstructing, resurfacing or repairing highways, roads, and streets connecting with such highways, all of which are accessible to and regularly used by general vehicular traffic, including traffic moving between points in Pennsylvania and points in other states.

(2) Contracts with interstate railroad companies, commercial and industrial firms engaged in the production of goods for commerce for sale of material and for material and labor to be used in the construction, reconstruction, repair or maintenance of roads, railroad crossings, parking areas and other facilities of such firms.

[fol. 6] (3) Contracts with private persons and others having no interstate activity and not engaged in interstate commerce or the production of goods for commerce, for sale

of material and for material and labor to be used in construction, reconstruction, repair and maintenance of road surface.

The period covered by the inspection was from June 30, 1943, through June 30, 1948. For this period the total volume of business done by defendant was $1,172,276.70, as follows:

Cressona Plant, Total volume $643,334.84 distributed as follows:

Pennsylvania Department of Highways	53.96% or	$347,177.55
Townships	9.99% or	64,327.68
Boroughs	3.32% or	21,362.45
Industrial	13.23% or	85,135.69
Railroads	2.20% or	14,154.80
Private	17.26% or	111,176.67

Naginey Plant, Total volume $237,991.99 distributed as follows:

Pennsylvania Department of Highways	33.25% or	$ 79,154.63
Townships	9.76% or	23,232.06
Boroughs	22.56% or	53,710.41
Industrial	13.79% or	32,834.43
Railroads	.92% or	2,205.75
Private	19.68% or	46,854.71

[fol. 7] Hanover Plant, Total volume $29,949.87 distributed as follows:

Pennsylvania Department of Highways	76.95% or	$223,904.12
Townships	1.12% or	3,294.06
Boroughs	3.04% or	8,872.97
Industrial	13.29% or	38,692.18
Railroads	1.56% or	4,566.62
Private	3.99% or	11,629.92

Defendant employs various classes of employees in its three plants and main office, including plant foreman, field foreman, equipment operators, laborers, semi-skilled

laborers, truck drivers, mixers, firemen, watchmen, and clerks. Equipment operators are engaged in operating such equipment as spreaders, graders, pavers, shovels, and rollers at times used directly in the work of constructing, repairing, or reconstructing the said highways and roads. Truck drivers are engaged in the following activities:

(1) Haul stone from the Bethlehem, Pennsylvania, quarry to the Hanover plant for use in the production of bituminous concrete materials.

(2) Haul the bituminous concrete materials from the company's Naginey and Cressona plants to the job site.

(3) Haul the bituminous concrete materials from the company's Naginey and Cressona plants to the job sites where the material is dumped into spreaders or pavers on the highway for application thereon.

[fol. 8] (4) At the Hanover plant the defendant's truck drivers do some hauling of the bituminous concrete materials from the plant to the job site. Pennsylvania Department of Highways, in some instances, has accepted bids for the said material F. O. B. plant, in which event the material is hauled from the plant to the job in Pennsylvania Highway Department trucks. For the most part, however, the trucking is performed by contract haulers, hauling from the plant to the job site, at an agreed price per ton, which is paid by the defendant.

Laborers and semi-skilled laborers rake amesite on the highways, spread stone base and perform pick and shovel work on roads. At the plants off-the-road employees, including mixers, firemen, watchmen, and clerks are engaged in, or perform work incident to, the production of bituminous concrete materials.

Most of the employees of the defendant of the classes above described are regularly employed in excess of forty hours per week without payment of extra compensation at time and one-half of their regular rate for such overtime hours. Wages are paid throughout the year to many of defendant's employees, including months during which defendant's plants do not operate and the employees do not work.

Prior to January 1, 1948, defendant, at its main office and each of its plants, failed to keep proper records as re-

quired by Title 29, Chapter V, Code of Federal Regulations, Part 516. Since January 1, 1948, defendant has kept records showing occupation, day and time of beginning of work week, number of hours worked each day, and number [fol. 9] of hours worked each week.

There is no segregation of work performed by truck drivers at the Cressona or Naginey plants in the hauling of road mix produced at these plants for use on existing highways, public roads and streets from other hauling work performed by them; nor is there any segregation of work performed by the so-called off-the-road employees employed at the company's three plants engaged in the production of road mix for use on existing highways, public roads and streets from other uses for which the road mix is produced.

Plaintiff contends that employees of the defendant actually engaged in the construction, repair, reconstruction, extension and maintenance of interstate highways, public roads and interstate railroads which are regularly used for interstate transportation are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938; also, that employees engaged in manufacturing and hauling road mixes produced at defendant's plants for use on interstate highways are engaged "in the production of goods for commerce;" also, that truck drivers who haul raw materials or ingredients to defendant's plants producing road mixes for use on interstate highways are engaged "in the production of goods for commerce."

Defendant, while admitting that its employees actually working on the highway or other instrumentality of interstate commerce itself, applying amesite in the repair or maintenance thereof as distinguished from original construction, are within the protection of the Fair Labor [fol. 10] Standards Act, contends that its employees engaged in the construction of new highways and its off-the-road employees do not have such immediacy of participancy in interstate commerce as to bring them within the coverage of the said Act.

The parties are not in agreement as to what constitutes new construction in relation to road building. Plaintiff insists upon the ultimate, i.e., new means the construction

of a road on a location in which no previous road existed; defendant contends that it includes the complete remaking of an old road bed, which almost always includes the use of a substantial part of the original location but also involves the straightening of curves and the elimination of hills which would necessarily cover some virgin road territory.

The function of the court in this situation is clearly pointed out by Justice Frankfurter in A. B. Kirschbaum Co. v. Walling, 316 U. S. 517, 523, 524.

> "* * * the scope of the Act is not co-extensive with the limits of the power of Congress over commerce, * * *. * * * the Fair Labor Standards Act puts upon the courts the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations. * * *
>
> "* * * the provisions of the Act expressly make its application dependent upon the character of the employees' activities. * * *".

In Overstreet et al. v. North Shore Corp., 318 U. S. 125, 128, 63 S. Ct. 494, 496, 87 L. Ed. 656, the court said:

> [fol. 11] "* * * And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations."

Again in 10 East 40th Street Building, Inc. v. Callus et al., 325 U. S. 578, 582, 65 S. Ct. 1227, 1228, 89 L. Ed. 1806, 161 A. L. R. 1263, Justice Frankfurter said:

> "* * * For as was pointed out in Walling v. Jacksonville Paper Co., supra, at 570, we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

Original construction is definitely beyond the contemplation of the Act.[1] But what is original construction? As indicated above, plaintiff insists upon the ultimate, i.e., the construction of a road where no road has previously existed. Defendant contends that any resurfacing of an old road bed is new or original construction. In the Kirschbaum case, supra (316 U. S. 517, 520), Justice Frankfurter aptly phrased the inherent difficulty in properly applying the provisions of the Act to the average industrial enterprise as follows:

> "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is [fol. 12] as rewarding as an attempt to square the circle * * *."

However, in attempting to determine what constitutes "commerce" or "engaged in commerce" we are cautioned that we are to be guided by practical considerations.

This defendant, according to the Stipulations, makes, distributes and applies its road material, amesite; its road work, covered by contracts with the Commonwealth of Pennsylvania and many of its political subdivisions, involved no completely original construction, it consisted entirely in some form of resurfacing of previously existing roads, either interstate as such or connecting with an interstate system, with the slight exception involved in the straightening of old road lines; its industrial and railroad work was in each cited instance done for the improvement of the facilities of concerns engaged in interstate commerce; its private work comprised about fourteen and one-half percent of its overall total and apparently involved no interstate activity. Furthermore, at none of its plants was there any segregation of work performed by its off-the-road employees who were engaged in work having definite interstate involvements from those of a purely private nature.

Starting with the premise that approximately eighty-

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[1] Kelly v. Ford, Bacon & Davis, Inc. (3 Cir.) 162 F. 2d 555, 561.

five and one-half per cent of its total volume of work for the period in question involved interstate facilities, the sole question remaining is, Was it or was it not original construction? A typical case would be a through highway carrying a State and frequently a United States highway [fol. 13] number. It may originally have been dirt, but it was none the less a part of an interstate system of highways. Just what sort of treatment would the defendant have us designate original construction on that old road bed? What difference does it make whether the old dirt road bed has simply been oiled, stoned and oiled, cemented or amesited? It is still the improvement of a previously existing interstate highway.

In Walling v. McCready Const. Co. (D. C. W. D. Pa.) 60 F. Supp. 243, 248 (aff. 156 F. 2d 932), the court, in my judgment, correctly analyzed this road situation as follows:

> "* * * In most of the highways involved in this case, where defendant claims the work was new,—even though the road follows the old—it relies on the magnitude of the work, notwithstanding the work was on the old road. In such cases there is no doubt that the work done by defendant was repair or reconstruction of an instrumentality of interstate commerce. In some instances, parts of the highway were relocated following the general location of the old highway, and served the same purpose. In those cases we are of the opinion the work done by the employees falls squarely within the Act. In such instances, the work done was clearly to improve portions of a highway that was used in interstate commerce."

I am of the opinion that the various plants of the defendant were all component parts of an integrated unit, eighty-five and one-half per cent of whose total output was di- [fol. 14] rected toward the improvement of various interstate facilities, and that all of the employees of the defendant are definitely within the scope of the statute. As interpreted by the Supreme Court in Overstreet et al. v. North Shore Corp., 318 U. S. 125, 129,

> "We think that practical test should govern here. Vehicular roads and bridges are as indispensable to

the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce. Cf. Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 218. Those persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce' even as was the bolt-carrying employee in the Pedersen case, supra, because without their services these instrumentalities would not be open to the passage of goods and persons across state lines. And the same is true of operational employees whose work is just as closely related to the interstate movement * * *."

My conclusion is, therefore, on the whole of the transactions involved in this case, that the plaintiff is entitled to an injunction, as prayed for.

An order for judgment in accordance herewith may be submitted on notice to opposing counsel.

(s) Frederick V. Follmer; United States District Judge.

February 23, 1951.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION FOR RE-ARGUMENT AND RE-CONSIDERATION—Filed February 28, 1951

To the Honorable Frederick V. Follmer, Judge of said Court:

Alstate Construction Company, by its attorneys, McNees, Wallace and Nurick, moves your Honorable Court for Re-argument and Re-consideration of the above-captioned case and assigns in support thereof the following reasons:

1. The provisions of the Fair Labor Standards Act apply only to those employees who are engaged either "in

commerce" or "in the production of goods for commerce". Neither plaintiff nor defendant contended that any of the defendant's employees were engaged "in commerce"; plaintiff contended that they were engaged "in the production of goods for commerce", relying chiefly on the so-called "ice cases" while defendant contended that its employees, and particularly the "off-the-road" employees, did not have such immediacy of participancy in interstate commerce as to bring them within the coverage provisions of the Act. The Court, without determining that any of defendant's employees are engaged "in commerce" or "in the production of goods for commerce", holds:

[fol. 16] (1) That defendant's off-the-road employees are engaged in work having "definite interstate involvements",

(2) That a large percentage of the total volume of defendant's work "involved interstate facilities" and "was directed toward the improvement of various interstate facilities" and

(3) That "all of the employees of the defendant are definitely within the scope of the statute".

2. The Court's opinion fails to cite, distinguish or consider the line of cases dealing with the coverage of off-the-road employees as cited in defendant's brief including:

(a) McLeod v. Thelkred, 319 U. S. 491, 63 S. Ct. 1248 (which involved an off-the-road employee of an interstate railroad).

(b) Walling v. Craig, 55 F. Supp. 479 (which involved off-the-road employees who operate off-the-road bituminous plants).

(c) Schroeder Company, Inc. v. Clifton, 153 F. 2d 385 (which involved quarry workers quarrying rocks for use upon interstate transportation lines, both railroads and highways).

(d) Wiley v. Stewart Sand and Material Co., 206 S. W. 2d 362 (which involved employees who produced rock for use upon the highways and railroad beds within Missouri).

(e) Ramos v. Puerto Rico Cement Corporation, Civil Case No. 4583 (which involved employees who pro-

[fol. 17] duced cement which went into interstate instrumentalities).

(f) Crabb v. Welden Bros., 65 Fed. Supp. 369 (which involved employees engaged in cutting and hauling timber in connection with the Alcan highway).

(g) McComb v. Trimmer (1924), 85 F. Supp. 565 (which involved employees of a company quarrying and processing stone for use in repair and maintenance of interstate highways).

Defendant's off-the-road employees who work in its bituminous plants are in exactly the same position as the employees in each of the above cited cases where coverage was denied, and we know of no case to the contrary.

3. The Court's opinion states that "all of the employees of the defendant are definitely within the scope of the statute" which would include even those who are engaged in surfacing private driveways, tennis courts, parking areas for new industrial plants, etc., none of which plaintiff has ever contended to be the case.

4. Plaintiff relies heavily on the so-called "ice-cases" and carefully attempts to demonstrate that the Schroeder case has been wrongly decided by the Circuit Court of Appeals for the Tenth Circuit. The opinion neither mentions the "ice-cases" nor the Schroeder case, the majority opinion of which, admittedly, supports defendant's position.

5. The Court seems to rely on the fact that "eighty-five and one-half (85½%) percent of its total volume of work [fol. 18] for the period in question involved interstate facilities". The Federal Courts have held repeatedly that the coverage of the Fair Labor Standards Act depends upon the character of the activities of a particular employee rather than upon the nature of the business of the employer. Thus, an employer may engage in both interstate and intrastate activity without bringing those employees within the scope of the act who are engaged in the intrastate activity:

Walling v. Jacksonville Paper Co., 317 U. S. 564; 63 S. Ct. 332.

Keen v. Mid-Continental Petroleum Corp., 63 F. Supp. 120, 129 citing cases.

6. The Court's opinion does not discuss the impact of the amendments to the Fair Labor Standards Act of 1949, particularly in view of plaintiff's contention that defendant's employees are covered under the provisions of the Act affecting those employed "in the production of goods for commerce".

Respectfully submitted, McNees, Wallace & Nurick, By Samuel A. Schreckengaust, Jr., Commerce Building, Harrisburg, Pennsylvania, Attorneys for Defendant.

February 28, 1951.

[fol. 19] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed March 30, 1951

The Court having considered the pleadings, the stipulations of fact filed by the parties and testimony of witnesses, and having heard the arguments of counsel and considered the briefs filed herein, and due deliberation having been had and the Court having made its decision in writing, filed February 23, 1951, ordering judgment for the plaintiff in accordance therewith, it is hereby

Ordered, adjudged and decreed that defendant, its officers, agents, servants, employees, attorneys and all persons acting or claiming to act in its behalf and interest, be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201, et seq.), as amended, hereinafter referred to as the Act, in any of the following manners:

(1) Defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for a workweek longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not [fol. 20] less than one and one-half times the regular rate at which he is employed.

(2) Defendant shall not fail to make, keep, and preserve records of its employees, and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the regulations of the Administrator issued, and from time to time amended, pursuant to Sec. 11(c) of the Act, and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.

(s) Frederick V. Follmer, United States District Judge.

Dated: March 30, 1951.

[fol. 21] UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action File No. 3189

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

v.

ALSTATE CONSTRUCTION COMPANY, Defendant

Appendix to Appellee's Brief

STIPULATION DETERMINING CERTAIN PERTINENT FACTS—January 17, 1949

It is hereby stipulated and agreed for the purpose of this case, and for this case only, that the following facts are true and correct, and that either party may introduce them into evidence at the trial of this case, each party reserving the right to introduce such further evidence as it sees fit at the trial of the case.

1. Alstate Construction Company, defendant, is a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office at 313 Chestnut Street, Harrisburg, Pennsylvania, and plants located at R. D. #3, Hanover, Adams County, Pennsylvania; Sillyman Street, Cressona, Schuylkill

County, Pennsylvania; and at Naginey, Mifflin County, Pennsylvania.

[fol. 22] 2. Defendant's principal office and its branch establishments are all within the jurisdiction of the United States District Court for the Middle District of Pennsylvania.

3. Defendant corporation is engaged in the production, sale, distribution, and further application of a bituminous concrete material, known as amiesite, for use in the construction, repair, reconstruction, and maintenance of interstate highways and other instrumentalities of interstate commerce for and by the Commonwealth of Pennsylvania and numerous political subdivisions thereof, and for use by interstate railroads and other industrial and commercial firms engaged in commerce or in the production of goods for commerce. The said bituminous concrete material is produced at each of the aforesaid three plants located at Hanover, Cressona, and Naginey.

4. Said bituminous concrete material produced by defendant consists of the following ingredients: limestone, nap-tha, asphalt filler, and lime. Approximately 8,000 gallons of asphalt are received from the Baltimore, Maryland, Refinery of the Standard Oil Company of New Jersey and pumped from railroad tank cars into the company's storage tanks each week at the Hanover plant. Approximately four to five hours are spent by employees at the Hanover plant each week in receiving, handling, and pumping the asphalt from the tank cars into the storage tanks of the plant where it is used in the production of bituminous concrete materials. Substantially all other ingredients are quarried or manufactured and purchased in the Commonwealth of Pennsylvania.

[fol. 23] 5. Defendant owns no facilities and employs no persons outside of the Commonwealth of Pennsylvania.

6. The period covered by the inspection and for consideration in this stipulation shall be from June 30, 1945, through June 30, 1948.

7. The said bituminous concrete materials, also known as HE, a cold mix, and ID2, a hot mix, otherwise known as macadam blacktop, are primarily marketed by the company in the following ways:

(1) Direct contracts with the Commonwealth of Pennsylvania and many of its political subdivisions for material and labor for constructing, reconstructing, resurfacing and repairing interstate highways, all of which are accessible to and used to a substantial extent by interstate traffic.

(2) Direct contracts with commercial and industrial firms engaged in the production of goods for commerce for material and labor to be used in the construction, reconstruction, repair and maintenance of roads and facilities of such firms.

(3) Sale of bituminous concrete materials to the Commonwealth of Pennsylvania and many of its political subdivisions, to interstate railroad companies, and to commercial and industrial companies engaged in commerce or in the production of goods for commerce for use by these customers in the construction, reconstruction, repair and maintenance of highways, public roads, streets, railroad crossings, and other plant facilities.

8. The total volume of business for each plant for the three and one-half (3½) year period 1945 through June [fol. 24] 1948, and the volume of business with the Pennsylvania Department of Highways, political subdivisions of the Commonwealth of Pennsylvania, interstate railroad companies, industrial companies engaged in the production of goods for commerce, and private customers of Alstate Construction Company are as follows:

(Here follows 1 Paster, side folio 25)

[fol. 25]

CRESSONA PLANT

Total volume of business	Pennsylvania Department of Highways	Townships	Boroughs	Industrial	
1945 —$200,775.11	1945 —$159,983.60..79.68%	1945 — $102.37.. .05%	1945 — $7,500.49.. 3.73%	1945 — $9,692.70.. 4.82%	1945
1946 — 185,805.56	1946 — 99,318.11..53.45%	1946 — 2,046.00.. 1.10%	1946 — 5,741.97.. 3.08%	1946 — 27,146.06..14.60%	1946
1947 — 199,630.20	1947 — 55,092.58..27.59%	1947 — 55,163.51..27.63%	1947 — 5,150.21.. 2.57%	1947 — 38,667.71..19.36%	1947
1948*— 57,123.07	1948*— 32,783.26..57.38%	1948*— 7,015.80..12.28%	1948*— 2,970.68.. 5.20%	1948*— 9,629.22..16.85%	1948*
Total 643,334.84	347,177.65..53.96%	64,327.68.. 9.99%	21,362.45.. 3.32%	85,135.69..13.23%	

NAGINEY PLANT

1945 — $50,005.41	1945 — $17,006.70..34.12%	1945 — $6,801.45..13.60%	1945 —$14,975.91..29.94%	1945 — $7,559.25..15.11%	1945
1946 — 72,789.55	1946 — 40,099.00..55.08%	1946 — 5,617.00.. 7.71%	1946 — 17,323.35..23.79%	1946 — 2,643.75.. 3.63%	1946
1947 — 81,970.89	1947 — 20,881.43..25.47%	1947 — 6,029.50.. 7.35%	1947 — 20,295.35..24.75%	1947 — 15,051.62..18.36%	1947
1948*— 33,226.14	1948*— 1,107.50.. 3.33%	1948*— 4,784.11..14.39%	1948*— 1,115.80.. 3.35%	1948*— 7,579.81..22.81%	1948*
Total 237,991.99	79,154.63..33.25%	23,232.06.. 9.76%	53,710.41..22.56%	32,834.43..13.79%	

HANOVER PLANT

1945 — $48,374.00	1945 — $11,620.07..86.03%	1945 — $604.56.. .12%	1945 — $1,558.28.. 3.22%	1945 — $1,602.63.. 3.31%	1945
1946 — 81,835.14	1946 — 59,033.70..72.13%	1946 — 1,255.00.. 1.53%	1946 — 3,159.59.. 3.86%	1946 — 11,861.00..14.49%	1946
1947 — 132,481.96	1947 — 118,834.85..89.69%	1947 — 802.50.. .60%	1947 — 2,987.20.. 2.25%	1947 — 4,411.55.. 3.32%	1947
1948*— 28,258.77	1948*— 4,415.50..15.62%	1948*— 622.00.. 2.20%	1948*— 1,167.90.. 4.13%	1948*— 20,817.00..73.66%	1948*
Total 290,949.87	223,904.12..76.95%	3,284.06.. 1.12%	8,872.97.. 3.04%	38,692.18..13.29%	

* 1948 (up to June).

Industrial	Railroads	Private	
945 — $9,692.70.. 4.82%	1945 — $9,037.68.. 4.50%	1945 —$14,458.27.. 7.20%	1945
946 — 27,146.06..14.60%	1946 — 2,146.50.. 1.15%	1946 — 49,407.82..26.59%	1946
947 — 38,667.71..19.36%	1947 — 1,859.81.. .93%	1947 — 43,696.38..21.88%	1947
948*— 9,629.22..16.85%	1948*— 1,110.81.. 1.94%	1948*— 3,614.20.. 6.32%	1948*
85,135.69..13.23%	14,154.80.. 2.20%	111,176.67..17.28%	

945 — $7,559.25..15.11%	1945 — $930.00.. 1.85%	1945 — $2,672.10.. 5.34%	1945
946 — 2,643.75.. 3.63%	1946 — 565.00.. .77%	1946 — 6,541.45.. 8.98%	1946
947 — 15,051.62..18.36%	1947 — 531.00.. .64%	1947 — 19,181.99..23.40%	1947
948*— 7,579.81..22.81%	1948*— 179.75.. .54%	1948*— 18,459.17..55.55%	1948*
32,834.43..13.79%	2,205.75.. .92%	46,854.71..19.68%	

945 — $1,602.63.. 3.31%	1945	1945 — $2,988.46.. 6.17%	1945
946 — 11,861.00..14.49%	1946 — $2,234.74.. 2.73%	1946 — 4,291.11.. 5.24%	1946
947 — 4,411.55.. 3.32%	1947 — 1,500.31.. 1.13%	1947 — 3,945.55.. 2.97%	1947
948*— 20,817.00..73.66%	1948*— 831.57.. 2.94%	1948*— 404.80.. 1.43%	1948*
38,692.18..13.29%	4,566.62.. 1.56%	11,629.92.. 3.99%	

[fol. 26] 9. From the start of the period of inspection in June 1945 through June 1948, some of defendant corporation's contracts of the first type listed above, namely, contracts for *labor and material* for resurfacing and repairing highways and roads of the Commonwealth of Pennsylvania and its political subdivisions, were as follows:

Legislative Route 199-7, Traffic Route, U. S. 209, located in Frailey and Reiley Townships, Schuylkill County, 4.30 miles, placing bituminous surface over concrete road previously used as main highway to New York. Work started on 7-23-45 and was accepted 7-25-46. Bid accepted was $178,389.40.

Contract No. 53-629—Branch Township, Schuylkill County, from Willing Street, Llewellyn at U. S. Route 209 to Schober Street. Schober Street to Rt. 209 on Willing. Schober to RR street. On RR Street to Phoenix Park on Cemetery road to Minersville Boro line, 15,840 feet of HE surface, 1 inch in depth and including widening curves and patching. Work started in November 1946 and completed April 1947. Amount paid $12,100.00. Road links Llewellyn with U. S. Route 209 and is used by mine traffic.

Contract No. 53-645—Norwegian Township, Schuylkill County, township routes 620, 624 and 618, resurfacing with bituminous material HE .35 mile started approximately 8-1-47 and completed about 8-21-47, amount of bid $8,750.00.

Cass Township, Schuylkill County, starting at Jonestown on route 604 to Forrestville on route 608, and on to Primrose on route 561, on to Duncott and Heckscherville on route 563 and 606, 15840 feet resurfaced with 2-inch bitumi- [fol. 27] nous concrete, value of contract $17,920.00. Road used by mine traffic. Started approximately September 15, 1947, and completed about 10-15-47.

Tremont Township, Schuylkill County, township road #625, Legislative route #53029 from Larberry to Lincoln Colliery to the village of Lincoln, surface 16-foot road of native stone base with coarse bituminous concrete, 5280 feet, started about 11-1-47 and completed about 11-30-47. Amount of bid $24,073.00. Road provides access from mines to colliery and is used by coal trucks.

Branch Township, Schuylkill County, township routes 557 and 568, 8000 feet from Legislative route 199 to Phoenix Park. Surface stone road with bituminous concrete. Con-

nects U. S. Route 209 with village of Llewellyn at which is located coal breaker. Road used by coal trucks. Amount of bid $22,833.13. Started about 10-15-47 and completed 12-2-47.

Contract No. 44-213—5132 gal. C-2 bituminous materials, delivered and applied Township Road 383. Approved as of June 30, 1947.

Contract No. 44-205—Mifflin County, Granville Township, Route 337—patching and resurfacing—$2,295.00. Route 355—repairing base, surface treatment—$2,832.00.

Contract No. 44-202—Mifflin County, Granville Township, Route 337—30 ton patching—$300.00, resurfacing—$1,841.45. Approved August 1, 1945.

Contract No. 44-203—Mifflin County, Granville Township, Route 311—20 ton HE—$200.00, surface treatment—$2,072.00. Approved August 1945.

[fol. 28] Contract No. 53-625—Schuylkill County, Norwegian Township, approved August 28, 1946. Township Road 708, bituminous material in place (laid and rolled)—$10,430.00.

Contract No. 44-200—Mifflin County, Derry Township, approved August 14, 1945. High School building, Greenwood Avenue, Red Lane. Routes 502, 425, 685, 401 connecting highways—$3,850.00.

Contract No. 44-206—Mifflin County, Derry Township, approved August 27, 1946. Township Road 394 (Knepp Avenue, Lewiston Heights), base excavation, surfacing, subgrade and shoulders—$5,569.80.

10. During the same period from June 1945 through June 1948, some of defendant corporation's contracts of the second type, namely, *labor and material* sold to commercial and industrial firms for the construction, reconstruction, repair and maintenance of plant roads and facilities, were as follows:

Standard Steel Company, Burnham, Pennsylvania, Division of Baldwin Locomotive Works, 1948 (spring).

Philadelphia & Reading Coal and Iron Company (Oak Hill Collieries), October-November 1947.

Day and Zimmerman, April 1947.

Otto Collieries, September-October 1946.

H. C. Boyer (Locust Summit Breakers), April-May 1946.

11. During the same period, some of defendant corporation's contracts of the third type involving the *sale of bituminous concrete materials* to the Pennsylvania Highway Department and to industrial, commercial, and railway companies were as follows:

[fol. 29]

Date	Purchase Order No.	Amount	For Use On Traffic Route No.
6/25/48	H 82029	1,451 Ton—$11,825.65	162 (U. S. 209) from Tamaqua West, etc.
5/10/48	H 79934	5,636 Ton—$47,342.40	162 (U. S. 209).
3/10/48	H 77517	485 Ton—$2,910.00	
10/6/47	H 71520	203 Ton—$1,421.00	
9/29/47	H 71250	390 Ton—$2,515.50	
		324 Ton—$2,025.00	192.
9/18/47	H 70921	1,131 Ton—$6,503.00 F. O. B. plant	8510.
9/19/47 Hanover	H 70924	3,706 Ton—$20,383.00 F. O. B. plant	
8/15/47	H 69588	7,446 Ton—$53,611.20	
		20 Ton—	123.
2/19/47 Nagany	H 61415	20 Ton— $653.20	28.
		20 Ton—	499.
		40 Ton—	4406.
3/18/47	H 62880	1,000 Ton— $5,500.00	
5/27/47	H 66166	1,235 Ton—$7,101.25 F. O. B. plant	
6/11/47	H 67049	4,266 Ton—$30,501.92	
8/21/46	H 55105	1,000 Ton—$5,000.00	162.
9/6/46	H 55671	5,028 Ton—$28,156.80	
		8,602 Ton—$48,171.20	123.
7/3/46	H 53381	515 Ton—$2,703.75	123.
7/1/46	H 53267	671 Ton—$3,106.10	
5/8/46	H 51014	1,000 Ton—$5,000.00	231.
5/6/46	H 50832	633 Ton—$4,399.35	
		257 Ton—$1,786.15	
6/7/46	H 52281	2,054 Ton—$16,945.50	121.
		1,368 Ton—$10,602.00	126.
		1,513 Ton—$9,002.35	126.
8/24/45	H 42496	150 Ton—$900.00	230.
		75 Ton—$450.00	Various routes.
		150 Ton—$945.00	
		75 Ton—$468.75	
		300 Ton—$1,500.00	
		1,833 Ton—$11,621.22	
8/10/45	H 42116	1,447 Ton—$10,129.00	

Some of the industrial, commercial, and railway companies to whom bituminous concrete materials were sold for use in constructing, reconstructing, repairing, and maintaining plant facilities during the period 1945 through June 1948 were: Standard Steel Company, Pennsylvania Edison, American Viscose, Atlantic Refining Company, Industrial Oil Company, Pennsylvania Electric Company, Bethlehem Steel, Pennsylvania Railroad, Western Maryland Railroad Company, Sinclair Refining, U. S. Department of Interior, [fol. 30] Stewart & March; W. W. Utz, Hanover Construction Company, Standard Oil Company, Reading Company.

12. The defendant employs various classes of employees in its three plants and main office, including plant foremen,

field foremen, equipment operators, laborers, semi-skilled laborers, truck drivers, mixers, firemen, watchmen and clerks. Equipment operators are engaged in operating such equipment as spreaders, graders, pavers, shovels, and rollers used directly in the work of repairing and reconstructing interstate highways and roads. Truck drivers are engaged in the following activities:

(1) Haul stone from the Bethlehem Quarry to the Hanover plant for use in the production of bituminous concrete materials;

(2) Haul the bituminous concrete materials from the company's three plants to the job site;

(3) Haul the bituminous concrete materials from the company's plants to the job site where the material is dumped into "spreaders" or "pavers" on the highways for application thereon.

Laborers and semi-skilled laborers rake amiesite on the highways, spread stone base and perform pick and shovel work on roads. At the plants, mixers, firemen, watchmen, and clerks are engaged in, or are necessary to, the production of concrete bituminous materials.

13. All employees of the defendant are regularly employed in excess of 40 hours per week without payment of extra compensation at time and one-half their regular rate for such overtime hours, except that all employees who [fol. 31] work on Sundays have received therefor compensation at time and one-half their regular rate. Many of defendant's employees receive wages throughout the year, including months during which defendant's plants do not operate and the employees do not work.

14. Defendant, at its main office and each of its plants, prior to January 1, 1948, has failed to keep complete records showing occupation, day and time of beginning of workweek, number of hours worked each day, number of hours worked each week or the weekly excessive overtime compensation for each employee, as required by Regulations Part 516, Title 29, Chapter V, Code of Federal Regulations. Since January 1, 1948, defendant has kept records showing occupation, day and time of beginning of

workweek, number of hours worked each day, and number of hours worked each week.

Dated: 17 January 1949.

(s) Wm. S. Tyson, (s) Ernest N. Votaw, (s) Louis Weiner, Attorneys for Plaintiff.
(s) McNees, Wallace & Nurick, By (s) James H. Booser, (s) Samuel A. Schreckengaust, Jr., Attorneys for Defendant.

[fol. 32] UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted]

SUPPLEMENTAL STIPULATION DETERMINING CERTAIN PERTINENT FACTS—March 4, 1949

It is hereby further stipulated and agreed for the purpose of this case, and for this case only, that the following facts are true and correct:

1. Most of the work performed by employees employed at the Cressona and Naginey plants of the defendant, Alstate Construction Company (hereinafter called Alstate), on the highways, public roads, streets, and on facilities of industrial plants, referred to in paragraph 7, subsections (1) and (2), of the original stipulation 7, subsections (1) and (2), of the original stipulation dated January 17, 1949, consisted of the construction, extension, alteration, repair, resurfacing, reconstruction, and maintenance of existing highways, public roads and streets, and necessary facilities of industrial plants engaged in the production of goods for commerce.

2. Most of the work performed by employees employed at the Cressona and Naginey plants of Alstate for "private customers", as referred to in paragraph 7, subsection (3), of the original stipulation dated January 17, 1949, con-
[fol. 33] sisted of the construction of driveways, cemeteries, playgrounds, etc.

3. There is no segregation of work performed by employees employed at the Cressona and Naginey plants of

Alstate who are engaged in the construction, extension, alteration, repair, etc., of existing highways, public roads, streets, and necessary facilities of industrial plants engaged in the production of goods for commerce, from the work performed for "private customers".

4. The bituminous concrete materials produced by the employees of Alstate at the Hanover, Cressona, and Naginey plants was produced for use in the construction, extension, repair, resurfacing, reconstruction, and maintenance of existing highways, public roads and streets, and for use on necessary facilities of industrial plants engaged in the production of goods for commerce, and for use by private customers engaged neither in interstate commerce nor in the production of goods for commerce.

5. There is no segregation of work performed by off-the-road employees of Alstate at the Hanover, Cressona, or Naginey plants engaged in the production of bituminous concrete materials for use on existing highways, public roads and streets, and for use on necessary facilities of industrial plants engaged in the production of goods for commerce, from other uses for which the said bituminous concrete material is produced.

6. There is no segregation of work performed by truck drivers of Alstate at the Cressona, or Naginey plants in the hauling of bituminous concrete materials produced at [fol. 34] these plants for use on existing highways, public roads, streets, and on necessary facilities of industrial plants engaged in the production of goods for commerce, from other hauling work performed by the said truck drivers.

7. Except for certain types of material used for patching purposes in the winter season, practically all of the bituminous concrete material produced at Alstate's three plants is applied to highways, roads, etc. immediately after production.

Dated: 4 March, 1949.

(s) Ernest N. Votaw, (s) Louis Weiner, Attorneys for Plaintiff.

(s) McNees, Wallace & Nurick, By (s) Samuel A. Schreckengaust, Attorneys for Defendant, (s) John W. Grenoble, President.

[fol. 35] UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted]

Extracts From Transcript of Testimony

Before Judge Frederick V. Follmer, Harrisburg, Pa., March 1, 1949.

APPEARANCES: For the Plaintiff: Louis Widener, Esq., and Ernest N. Votaw, Esq., Philadelphia, Pa. For the Defendant: James M. Quigley, Esq., Harrisburg, Pa.

Reporter: John J. Butler.

* * * * * * *

MR. CHARLES H. EICHENBERG, called and sworn on behalf of the plaintiff, on direct and cross-examination, testified as follows:

Direct examination by Mr. Widener:

Q. What is your name?
A. Charles H. Eichenberg.
Q. Where do you live, Mr. Eichenberg?
A. Minersville, Pennsylvania.

[fol. 36] By the Court:

Q. Is that in Schuy-kill County?
A. Yes, sir.

By Mr. Widener:

Q. You have been employed by Alstate Construction Company?

A. Yes, sir, not at the present time. I have been last Summer.

Q. When did you start working for Alstate Construction Company?

A. The latter part of April or the beginning of May.

Q. What year?

A. 1948.

Q. What territory did you work out of?

A. Cressona, Schuylkill County.

Q. Is that one of the Alstate Construction Company's plants?

A. Yes, sir.

Q. What was your occupation?

A. I was a paver operator.

Q. What jobs did you work on?

A. I worked for the State Highway down on Route 209 between Tamaqua and Port Carbon resurfacing a concrete road, laid amiesite on it. I worked for the——

Q. Route 209, is that a United States Highway?

A. Yes, sir.

Q. While you worked on that job, who were you paid by?

A. Alstate Construction Company.

[fol. 37] Q. What kind of work was involved on the United States Route 209 job?

A. Resurfacing the concrete with amiesite.

Q. Was the road previously existing there?

A. Yes, sir.

Q. So that you laid new topping?

A. That is right, sir.

Q. Of amiesite?

A. Yes, sir.

Q. How long did you work on that job?

A. From May until September.

Q. Of what year?

A. 1948.

Q. Who worked with you on that job?

A. There was another man from the Alstate Construction Company was the roller operator by the name of Smith. I think his first name was Raymond. All the rest were State-employed men.

Q. Do you recall how many miles of road was resurfaced on that job?

A. No, I couldn't tell you exactly, sir.

Q. Did you work on any other job while you were employed by Alstate Construction Company?

A. Yes, sir, the Remaley job in Tamaqua, a parking lot. A parking lot we paved; and a place where they stored their steel, we paved that.

Q. By the Remailey job, what do you mean? Who or what was Remailey?

A. Remailey was the man who makes shakers for the colleries to size their coal. It is a steel plant.

Q. A steel fabricating plant?

A. Yes, sir.

[fol. 38] Q. Where is it located?

A. Tamaqua.

Q. And you say it does what?

A. It makes shakers, screens to size coal that they use at the different collieries.

Q. What kind of work did you do? A. Paved the parking lot for them and place to store steel, that was paved.

Q. Where was the parking lot located?

A. Right on their grounds in Tamaqua.

Q. Inside the plant grounds?

A. Yes, sir.

Q. Do you know what the parking lot was used for?

A. Their own equipment and storage.

Q. Storage of what?

A. Steel.

Q. Did Remailey use steel in the manufacture of its products do you know?

A. Yes, sir.

Q. Did you work on any roads in connection with the Ramailey job?

A. No, they connected right on the main street, one of the main streets of Tamaqua. We ran an apron from his lot right to the highway, the main street.

Q. By running an apron, just what do you mean?

A. Where cars or trucks come out of his property on to the main street. We paved that right out. You have a solid road right to the main road. It would be like a main intersection.

Q. Connecting Remailey with the main road?

A. Yes, sir.

[fol. 39] Q. Remailey trucks use that?

A. Yes, sir.

Q. What road was it this apron connected with?

A. Oh, I don't know. It is a street in Tamaqua which connects with 209.

Q. Did you work on any other job for Alstate Construction Company?

A. Yes, I worked on another road job in the Pocono Mountains the past Summer. I don't know what route it is. The same procedure was went through as went through on 209. We did the same thing. It was a concrete road, and we resurfaced it. I don't know the route. It was a State road.

Q. Do you know between which points that road connected?

A. It went into Stroudsburg.

Q. From where?

A. Sir, I can't tell you that.

Q. Which side of Stroudsburg was it, west, north, east, or south?

A. West. There was a little town outside of it called Sciota. That is the only town I know of.

Q. Did it connect Sciota with Stroudsburg?

A. Yes, sir.

Q. It was on that road?

A. Yes, sir.

Q. Were there any other jobs that you worked on for Alstate Construction Company during your employment?

A. Only the Lancaster Transportation which was a new job.

Q. What kind of work did you do?

[fol. 40] A. They built a new warehouse, and we graded and paved it for them, the parking lot where trailers loaded and unloaded. That is the only other job besides the road resurfacing jobs.

Q. Do you know whether the road that you worked on, particularly the United States Route 209, is used by the United States mails?

A. Yes, sir, it is.

Q. Do you know whether that road is used by freight and express trucks?

A. Yes, sir, it is.

Q. Do you know whether that road is used by traffic from Pennsylvania to other states and from other states into Pennsylvania?

A. Yes, sir.

By Mr. Widener:

That is all.

Cross-examination.

By Mr. Quigley:

Q. Mr. Eichenberg, in your work for Alstate Construction Company at the Remailey plant and at the Lancaster Transportation plant, was that new construction?

A. The Lancaster Transportation was a new construction job. The Remailey job, the parking lot was there but it was never paved before. It was the original ground. We just put the amiesite on top of it. The parking lot had been there for years. The only thing that was paved was from his fence or boundary line to the street. That had been concreted, and we resurfaced it with amiesite.

[fol. 41] Q. You say the parking lot at the Remailey plant was there, the nature of its surface?

A. Yes, sir.

Q. What was the nature of its surface?

A. Cinders.

By Mr. Quigley:

Your Honor, I understand the purpose of the testimony today was to establish the fact that the type of work done by Alstate Construction Company was primarily that of repairs, repairs to interstate highways. I would request that the testimony of the witness as to the Remailey plant and the Lancaster Transportation lot be stricken.

By Mr. Widener:

I think there was no limitation on the type of testimony to be taken today so long as it pertained to the stipulation that was agreed upon. I think what the witness testified to was in clarification as to the work that he did.

By the Court:

I am not familiar with what the stipulation was. I will overrule the objection and note an exception. I may change the ruling after I see the stipulation.

By Mr. Quigley:

That is all.

Redirect examination.

By Mr. Widener:

Q. How long did the Lancaster Transportation job take?
A. About three weeks, sir.

[fol. 42] By Mr. Widener:

That is all.

Mr. Pierce A. Kraeemes, called and sworn on behalf of the plaintiff, on direct- and cross-examination, testified as follows:

Direct examination.

By Mr. Widener:

Q. What is your name?
A. Pierce A. Kraeemes.
Q. Where do you live?
A. Pottsville Street, Cressona, Schuylkill County.
Q. Were you employed by Alstate Construction Company in June 1945, through June 1948, at any time during that period?
A. Yes, sir.
Q. When did you first start working for Alstate Construction Company?
A. I just can't recall the date.
Q. Will you please speak up?
A. I just can't recall the date. I worked for them once in 1929 to 1941 I think it was, and I just don't know the dates that I had started for them again. I came back again in 1946 I think it was.
Q. When you came back in 1946, what plant did you work for?
A. I come back to the Cressona plant.
Q. What work did you do at the Cressona plant?

A. Well first I was working around the plant. Then they gave me a title as truck foreman. I went around and [fol. 43] did different work, anything to be done from pick and shovel up to repairing equipment.

Q. Let's get just a bit more specific. You say you were a truck foreman at one time?

A. Yes, I worked at the plant so long. Then they gave me the title of truck foreman. I did anything that was to be done.

Q. As truck foreman, what did you do?

A. Sometimes I went out and used a pick and shovel, yes, sir, anything that was to be done.

Q. Did you take that material by truck to the job?

A. Yes, sir.

Q. Did any men work with you on that type of work?

A. Yes, sir.

Q. Who were the men that worked with you?

A. Well, sir, that is pretty hard to say, pretty near every man at the plant worked with us. We worked together, as far as I was concerned.

Q. Worked together in doing what?

A. Laying amiesite, yes, sir. When we were at the plant —there were three of us at the plant. When out on the road, the whole gang worked together.

Q. Did any of the men haul amiesite by truck with you while you were truck foreman?

A. Yes, different ones, Ray Smith; I believe William Munsinger; he hauled some at that time; John Niodna. I don't recall who the other truckdrivers were.

Q. About how many truckdrivers were there? A. At that time I believe there were six.

[fol. 44] Q. Where did they get the bituminous concrete material from which they hauled?

A. The Cressona plant.

Q. Did they make it at the Cressona plant?

A. That is right.

Q. They hauled it from the Cressona plant to where?

A. Well, to the different jobs. I worked at the job at the Oak Hill quarry and like that, sir; and different townships we hauled to. I just don't recall the township roads I helped to haul the material to.

Q. Did you haul the material to the job site and dump it on the side of the road or did you leave it on the road?

A. We left it on the road.

Q. At the plant where the bituminous concrete material was made, what did you do?

A. I used to stock the bins with stones and help make repairs, run loaders, run stones out of the yard; help take stones out of the cars. Some of the stones were in cars, I helped unload that, and make repairs on equipment.

Q. Where were the stones shipped from?

A. They were shipped in from the Bethlehem Steel. I don't know what plant.

Q. Did they have a stone quarry in Pennsylvania? A. I can't say that. I know most of the stone came from the Bethlehem Steel. Where it came from, I don't know.

Q. Did you do any mixing at that plant?

A. Yes, sir. I didn't do it down at Cressona. I was running the plant at Naginey.

[fol. 45] Q. Did you do any mixing at the Cressona plant?

A. Yes, not very much there.

Q. What other type of work did you do while you were employed at Cressona?

A. I used to do all their trailing after they got finished at one place, trailed their equipment from one place to another, hauling shovels and rollers around.

Q. To the job sites and back?

A. Yes, sir.

Q. Did you do any repair work on the trucking equipment?

A. Yes, sir.

Q. Was that the trucking equipment which was used in the repair of the State highways?

A. Yes, sir.

Q. Of the township roads?

A. Yes, sir.

Q. Of the borough roads?

A. Yes, sir.

Q. Did you work at any of the other plants of Alstate Construction Company?

A. Yes, sir, I ran a plant up at Naginey, Pennsylvania.

Q. When was that?

A. 1947 and 1948.

Q. What did you do at the Naginey plant?

A. I mixed all the material. Then I also helped when there were other jobs like when there wasn't very much mixing, I went out and helped on the road.

[fol. 46] Q. By helping on the road, what do you mean?

A. I helped lay the stone base; I helped take the equipment in to do what they wanted to do; I helped lay the stone base; hauled material of all kinds, whatever had to be hauled.

Q. What jobs were those or do you remember?

A. The one in particular was the Standard Steel. We resurfaced some road there and built part of another road.

Q. The Standard Steel is located where?

A. In Lewistown.

Q. Is that a division of the Baldwin Locomotive Parts?

A. That is right.

Q. What do they make?

A. Wheels for engines and cars. They also make different shafts for cars. It is sort of a steel—I don't know what you would call it—a steel foundry.

Q. What was the nature of the work you did at that plant?

A. I helped lay the stone base; I helped with the equipment; and also hauled amiesite.

Q. Was that on a road that was already there?

A. Part was there and part we built a new piece to.

Q. Was that an extension of an old piece of road?

A. That is right.

Q. Was that on the plant grounds?

A. Yes, sir, that was inside the fence.

Q. Did you do any other work connected with the Standard Steel job?

A. No, sir.

[fol. 47] Q. What other job did you work on? Did you work on any highway job?

A. We rebuilt some township roads that I helped haul equipment in on. I don't recall what jobs they were.

Q. Do you remember the townships?

A. I believe it was in Derry Township but I couldn't swear to that.

Q. What other job did you work on out of the—when you were employed at the Naginey plant?

A. We laid a road—we resurfaced a road. In fact we reconstructed a road in Naginey Township, the Borough of Naginey, or whatever that is. I guess that is owned by the Bethlehem Steel. I am not sure of that.

Q. Did you work at the Oak Hill quarry job?

A. That was worked out of the Cressona plant.

Q. The Oak Hill quarry job, what did you do; what kind of work?

A. I can't recall.

Q. Did you do any road work in connection with the quarry?

A. I just couldn't tell you. I know I went up after the roller. I moved a roller out of there. I was on so many jobs at different places, I just can't recall all of them.

By Mr. Widener:

That is all.

Cross-examination.

By Mr. Quigley:

No questions.

[fol. 48] By Mr. Widener:

John S. Niodna.

Mr. John S. Niodna, called and sworn on behalf of the Plaintiff, on direct- and cross-examination, testified as follows:

Direct examination.

By Mr. Widener:

Q. What is your name?

A. John S. Niodna.

Q. And where do you live, Mr. Niodna?

A. Middleport, Schuylkill County, Pennsylvania.

Q. Are you employed or were you employed by Alstate Construction Company?

A. Yes, sir.

Q. When did you start working for the company?

A. It was two days before V-J Day in 1945.

Q. And did you work for the company during 1945, 1946, 1947, and 1948?

A. Yes, sir, up to August of 1948.

Q. What plant did you work out of?

A. Cressona plant.

Q. What is your occupation?

A. You mean in general or individual?

Q. Well what did you work on mostly?

A. Well God only knows. Well I started off I laid concrete, graded edges and laid concrete, finished off concrete.

Q. On what?

A. The Tremont Highway.

Q. Then what did you do?

[fol. 49] A. Then I was a carpenter that fall and summer, building up buildings around the plant and repairing the plant for early 1946.

Q. Building what plant?

A. The Cressona plant. We built a big garage. We enclosed elevators and a mixing plant and corrugated iron, and I believe we put a new boiler in but I am not certain.

Q. Was this in connection with production, the repair work?

A. Yes, sir, that was repairing and building up the plant for 1946. In 1946 I operated a roller and finished up the Tremont Highway.

Q. You operated a roller on the Tremont Highway, what highway was that?

A. That was coming from Tremont and Pottsville and going to Lykens.

Q. Was that a United States highway?

A. I believe it was.

Q. Do you remember the number?

A. Offhand I couldn't recall unless I see it on the map.

By the Court:

Q. You don't know for sure whether it was a State highway?

A. It was a State highway but I don't know the route number.

By Mr. Widener:

Q. Where did the highway go?

A. It started off from Pottsville. There was a cut-off before you hit Minersville. You turn right and go up [fol. 50] over the hill into Llewellyn and Branchdale into Tremont and into Lykens and down in from there.

Q. You say you operated a roller on that job?

A. Yes, sir.

Q. What does that mean?

A. When the material was laid, I just flattened it out.

Q. Did you work on any other jobs on roads or highways while you were employed by Alstate Construction Company?

A. Yes, sir.

Q. What other jobs?

A. Case Township road, Branch Township, Tremont Township; that was 1946 and the early part of 1947.

Q. What did you do?

A. In 1946 I operated a roller; the early part of 1947 I operated a grader finishing off, putting the roads in shape. The roads were there and had a stone base in already. All I had to do was sweep up the ashes from the road, fill in the holes and all, and they came back and started laying the top over. There were jobs at Case Township that connected the main highways and a few others like that. The Oak Hill—I operated on that.

Q. Now in your work on these highways and roads that you just described, Mr. Niodna, was that work on roads which already were in place, already existed, or was that new construction?

A. A lot of these roads had black top on. At Case Township the majority of the roads were resurfaced. At Branch [fol. 51] Township a lot of roads had a stone base in, No. 4 stone. That was the base for final finishing, the

black top to go on. There were little holes in them, probably the wash. All you do is you got to carry stuff in from the ditch line.

Q. Carry what stuff?

A. The stone that was loose alongside the side. You bring that in and put the crown on and fill in the bituminous or whatever composition you use for that specific job.

Q. Was that the kind of road work that you did throughout your period of employment?

A. No, sir.

By the Court:

What is the purpose of all this examination?

By Mr. Widener:

The purpose of all this examination is to show Your Honor it wasn't original construction which these men were performing but that it was reconstruction, resurfacing, maintenance and extension of already existing roads.

By the Court:

What difference does it make? Isn't the whole case predicated on the question as to whether or not this work, whether it was new or old, was on interstate roads? Is that the question?

By Mr. Widener:

No, that is not the issue particularly.

By the Court:

What is the issue?

[fol. 52] By Mr. Widener:

The issue is whether or not the work which these men did was resurfacing of highways which carried persons or property in interstate commerce.

By the Court:

What difference does it make whether they were remaking a road or making a brand new road if it was interstate commerce?

By Mr. Widener:

This difference, if it was original construction there would be no coverage under the Act. We concede that. We say this isn't original construction, this is repairing, maintenance and resurfacting of already existing roads, and that kind of work, Your Honor, is covered. Since the defendant in the brief devoted twenty pages out of twenty-seven attempting to prove this was original construction, we felt we ought to show to the Court the kind and nature of the work that these men performed.

By the Court:

Is it your contention that if the State takes over a black top road that is bad and puts a cement road in that that is not new construction?

By Mr. Widener:

That is not original construction.

By the Court:

Is that where you differ? The defendant claims that is original construction?

[fol. 53] By Mr. Widener:

I assume that is the defendant's contention.

By the Court:

Under your theory you have to go through a field where there was no semblance of a road at all to have original construction?

By Mr. Widener:

Yes, that is original construction.

By the Court:

That certainly would be original. There is no question about that.

By Mr. Widener:

That certainly would be original. There is no question about that.

By the Court:

You insist upon the ultimate, no half-way on your theory?

By Mr. Widener:

No.

By the Court:

It has to go through the middle of a field to be original construction?

By Mr. Widener:

We say this, the kind of work these men performed for Alstate Construction Company was not original construction.

By Mr. Widener:

Q. Now what other work did you do—but before we go into the other types of work, did all your work consist of [fol. 54] resurfacing or repairing already existing roads or did you do any work on the construction of new roads which did not exist before?

A. Offhand I couldn't say either way.

Q. Did you work at Case Township?

A. Yes, sir.

Q. Was that work on roads which already existed; was that resurfacing?

A. Yes, sir. You see the stone base was in. That was put in during the era of the W. P. A. At that time there was stone brought in and manual labor cracked it by hand. All they put over it was plain ashes. Traffic kicked it back and forth, kicked it bad. Therefore, you have to roll anything like that to tie the stuff in right. All you had to do was scrape the dirt back in and roll it and put black

top on it. Some places there were areas—there were stones in areas, there were places where cars got at it bad and so on, that was put on with a peculiar foundation. Old roads that existed maybe five or ten yards may be cut up, some places a curve you make it straight, but all in all the road existed there.

By the Court:

Q. It might have been a dirt road?

A. Yes, sir, yes, all they did was to put the black surface on.

Q. Did you drive trucks?

A. Yes, sir, off and on.

Q. When you drove a truck, what did you carry?

[fol. 55] A. I carried HE, what we call amiesite, or HB, that is a different mix. That is what they mix in at the plant, HE or HB. I hauled it to McAdoo on the State Highway. I hauled it to Shenandoah; I hauled it to a bridge job connecting Heckscherville and Minersville, there was a bridge out. All they did was tear out the planking and put new planking in and resurface it with black top. I hauled it to Locust Gap where there was a plant up there of the Reading Coal and Iron Company. There was a road built up there. It was practically put on coal dirt. I hauled material on that.

Q. What kind of work did you do on that job?

A. Just hauled material there.

Q. Did you do any construction work on that job?

A. No, sir, I just hauled the material in there.

Q. Did you dump any of the material into pavers on the highway when you hauled?

A. Yes, sir, 209 and the road to McAdoo I dumped into the paver. Locust Dale or Locust Summit—I am not sure of the name. There is a plant of the Reading Coal and Iron Company there.

Q. Did you do any repairing of equipment?

A. Yes, sir. I was a maintenance man at this place here. That covered also if the fireman didn't come out, I fired the boiler. If the mixer didn't come out, I mixed the material.

Q. When was the equipment repaired?

A. All during the daytime or after you got finished. If the machine didn't work right all day, you fixed it then or later.

[fol. 56] Q. Did you do repair work during the dead season?

A. Yes, sir, I did repair work during the dead season.

By the Court:

What does that have to do with this?

By Mr. Widener:

That has to do with whether or not these men were covered for the period they were employed by Alstate Construction Company.

By the Witness:

We would close down in September and not work until the last of April. As soon as it got warm and hot enough to work to handle material the right way, we went out and worked.

By Mr. Widener:

Q. During the dead season you said you repaired equipment?

A. Yes, sir.

Q. What kind of equipment?

A. Graders, pavers, spreaders, new worms, drags, motors, anything; make sure the machine worked all right; went over it with a toothpick and comb.

Q. Was that equipment used the next season in construction work?

A. The rollers were all repaired—any type of equipment that needed repairs for the following season.

Q. Did you perform repair work during the regular season each day?

A. A little bit each day, maybe one day you would spend a longer time than another. If the roller operator didn't come out, I went and operated the roller. If the grader [fol. 57] operator didn't come out, I went and operated the grader.

Q. These roads you worked on, were they located in the anthracite coal regions?

A. Yes, sir.

Q. Were they used by coal trucks do you know

A. Yes, sir. They hauled coal out into the township. I know one place, Case Township, what they call the upper Jonestown Road there is a place Jonestown out in the valley; the top of the hill is another road, they have a plant there. If I am not mistaken, it is the Life Oak Coal Company. The Life Oak Coal Company hauls coal down the upper Jonestown Road and loads the coal into cars. There was a railroad track there. I don't know the name of the railroad. The road crosses the railroad track.

Did you do any laying of amiesite on the railroad crossing?

A. Pine Grove, for the Reading Company at Tamaqua, the Reading Station and Terminal. It was out from the platform about twenty or maybe thirty feet I imagine with about—I would say about 100 yards long approximately.

Q. These roads you worked on as a roller operator, were they used by the United States mails do you know?

A. They had mail boxes along the road and mail came through there, it must have.

Q. Do you know if the roads were used by trucks carrying goods between Pennsylvania and other states?

[fol. 58] A. I know 209 for sure and the other ones I know coal was hauled over them.

By Mr. Widener:

That is all.

Cross-examination.

By Mr. Quigley:

No questions.

* * * * * * *

By Mr. Quigley:

Your Honor, on that point mentioned by the witness and counsel, it seems to me it may be a matter of most as to

what is new construction. As to the type of work done, I am in a position to say they went out and did repair work on the road.

By the Court:

I don't think it should be necessary to bring witnesses in here to say a certain type of road existed someplace. You are certainly not in a position to dispute that.

By Mr. Quigley:

That is right.

* * * * * * *

Mr. John W. Grenoble, called and sworn as of cross-examination by the Plaintiff, on direct- and cross-examination, testified as follows:

Direct examination.

By Mr. Widener:

I am calling this witness for cross-examination as President of the Alstate Construction Company.

* * * * * * *

By Mr. Widener:

Q. Did you do any resurfacing of highways?
[fol. 59] A. Yes.
Q. Did you do any repairing of highways, patching of highways?
A. No, not State highways.
Q. What highways did you patch?
A. The only highway that we patched for the highway department, you might call it patching, was the State highway with concrete before it was covered with black top, but that in my mind is not repairing.

By Mr. Widener:

We object.

By the Court:

Let's not speak of what you think is repairing. That is what you asked him.

By Mr. Widener:

That is what I asked him.

By Mr. Widener:

Q. Did you patch any roads?

By the Court:

He already said he hasn't.

By Mr. Widener:

Q. Did you patch any roads?

A. I can't answer your question did we patch any roads for this reason——

Q. Just a minute. I am not interested in the reason why you can't answer the question. I just want to know whether your company did or did not patch any roads?

[fol. 60] A. If I may elaborate this way, if we have a road that we are to resurface and there is a depression in the road, or a "butt hole," as we call it, we will patch that first which, of course, probably in the eyes of the law, is patching a road but it is merely raising a depression so that when your paving machine comes over it, it doesn't throw the depression back into the road. The patch is covered with new surface. If that is called patching, yes, we patched lots of roads, miles and miles and miles, but then we have covered them with new surface, but I have never taken a contract from a political subdivision to go out and just patch a road. The State highway, the boroughs, and the townships all have their own crews for that.

Q. Did you do any work for the Standard Steel in Burnham, Pennsylvania?

A. Yes, sir.

Q. What kind of work was it, Mr. Grenoble?

A. Well we have done two or three different kinds of work. We resurfaced some roads and build some new ones.

Q. Where did you build the new ones?

A. On the island, as they call it, within the plant itself.

Q. Were those extension of roads?

A. No, they weren't extension of roads. They were replacing dirt roads with hard roads.

By the Court:

Q. You mean on their own private property?

A. Yes, sir.

[fol. 61] By Mr. Widener:

Q. What other type of work did you do for the Standard Steel Company?

A. We have done some outright machine work. In other words, we have rented them shovels; we have rented them graders. But outside of that that is all the work we can do for them. That is all our line would permit.

Q. And in the work for the Standard Steel Company that you have just enumerated for us, what type of employees did you employ, what kind of employees to work for you? Were they laborers, semi-skilled laborers, equipment operators?

A. We employed all of them.

Q. All of those classifications?

A. We had some laborers, equipment operators, and semi-skilled men.

Q. Was bituminous material used on that road supplied by one of your plants?

A. Yes, sir.

Q. Which plant was it?

A. The Naginey plant.

Q. Did you do any work for the American Viscose Company?

A. Yes, sir.

Q. What kind of work did you do for that company?

A. Resurfacing.

Q. Of what?

A. Old roads.

Q. Was that likewise within the plant confines?

[fol. 62] A. Well I can't say it was within the plant con-

fines. I would say it was on the plant property but not all entirely within the fence.

Q. Were those roads used by the American Viscose Company's trucks or other trucks?

A. Oh yes, surely. They are also used by the public, if I may add.

Q. How close to the plants were these roads located?

A. Well it goes—the road that would probably be in question goes from the State highway into the plant.

Q. What was the number of the State highway there, do you recall?

A. No, I can't offhand. I am sorry, that was a township road. It was a township road rather than a State highway. It was a township road but it was a hard-surfaced top.

Q. Did you do any other work for the American Viscose Company?

A. Only furnish material.

Q. Where was it furnished from?

A. Naginey. They merely wanted a truckload of material brought into the plant and our truck brought a load of material into the plant.

Q. Did you do any work for the Atlantic Refining Company?

A. A couple of small driveways along gas stations.

Q. Where were they located?

A. Several around Lewistown, several around Pottsville. In fact we done several of those in different localities, paved gas stations for them.

[fol. 63] Q. That bituminous material was furnished from the Naginey plant?

A. Not all of it.

Q. Where would it be furnished from—Hanover?

A. No, I would say from Cressona or Naginey.

Q. Do you know what kind of product the American Viscose Company produces?

A. They produce, so far as I know, a wood-pulp product for the manufacture of rayon, and they produce a cotton for the manufacture of automobile tires. They are interstate commerce, if that is what you are getting at.

Q. They ship goods in interstate commerce?

A. Yes, sir.

Q. How about the Standard Steel Company, do they ship goods into interstate commerce?

A. They are interstate commerce also, surely.

Q. Mr. Grenoble, at the Naginey plant did you keep any records which would show which jobs your employees worked on?

A. No. If you mean these small jobs, no.

Q. Did you keep any records as to whether or not they worked on jobs for private users or for industrial firms or for State highways; did you keep any records which would show each job they worked on?

A. When they were under contract, yes.

Q. When they were not under contract?

A. No. The men may have been on five or six jobs each day. It would be foolish. We can't see the reason for hiring two or three people to keep the public satisfied.

[fol. 64] Q. Any of the men may have worked on all kinds of work that the Allstate Construction Company performs?

A. In some plants, yes.

Q. How about the bituminous production people, did they produce bituminous material specially for industrial plants, highway jobs, private customers, or was bituminous material made up for all types of work without discrimination?

A. All the bituminous concrete mixed in all our plants is mixed in accordance with the Pennsylvania Department of Highway specifications unless the customer asks otherwise. However, when producing material for the Pennsylvania Department of Highways, they have their inspector on the job at all times at our plant to see that it is mixed in accordance with the specifications. When we produce for some individual that wants only four or five tons, it is produced with the same formula with no inspector there.

Q. You produce the same material with the same program, the same material comes out?

A. We try to stick as close to it as we can.

Now when we have contracts—and almost in 100% of the cases those are contracts with industrial firms covered by the interstate commerce laws.

* * * * * * *

(Court adjourned.)

[fol. 65] Appendix II

Extracts from Interpretative Bulletin

(a) *General principles.*—As has been made clear previously, where "goods" (as defined in the Act) are produced "for commerce," every employee engaged in the "production" (as explained in section 776.15 through 776.19) of such goods (including any part or ingredient thereof) is within the general coverage of the wage and hours provisions of the Act. Goods are produced for "commerce" if they are produced for "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."[47] Goods are produced "for" such commerce where the employer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in such interstate or foreign commerce.[48] If such movement of the goods in commerce can be reasonably anticipated by the employer when his employees perform work defined in the Act as "production" of such goods, it makes no difference whether he himself, or a subsequent owner or possessor of the goods, put the goods in [fol. 66] interstate or foreign commerce.[49] The fact that goods do move in interstate or foreign commerce is strong

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[47] Fair Labor Standards Act, Sec. 3 (b).

[48] *United States* v. *Darby*, 312 U. S. 100; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Schulte Co.* v. *Gangi*, 328 U. S. 108.

[49] *Schulte Co.* v. *Gangi*, 328 U. S. 108; *Warren-Bradshaw Drilling Co.* v. *Hall*, 417 U. S. 88. See paragraph (d) of this section.

evidence that the employer intended, hoped, expected, or had reason to believe that they would so move.

Although it is generally well understood that goods are produced "for" commerce if they are produced for movement in commerce to points outside the State, questions have been raised as to whether work done on goods may constitute production "for" commerce even though the goods do not ultimately leave the State. As is explained more fully in the paragraphs following, there are certain situations in which this may be true, either under the principles above stated (see paragraph (c) of this section), or because it appears that the goods are produced "for" commerce in the sense that they are produced for use directly in the furtherance, within the particular State, of the actual movement to, from, or across such State of interstate or foreign commerce. (See paragraph (b) of this section.)

(b) *Goods produced for direct furtherance of interstate movement.*—(1) The Act's definition of "commerce," as has been seen, describes a movement, among the several States or between any State and any outside place, of "trade, commerce, transportation, transmission, or communication." Whenever goods are produced "for" such movement, such goods are produced "for commerce," whether or not there is any expectation or reason to anticipate that the particular goods will leave the State.[50]

[fol. 67]

(2) The courts have held that particular goods are produced "for" commerce when they are produced with a view to their use, whether within or without the State, in the direct furtherance of the movement of interstate or foreign commerce. Thus, it is well settled that ice is produced "for" commerce when it is produced for use by interstate rail or motor carriers in the refrigeration or cooling of the equipment in which the interstate traffic actually moves, even though the particular ice may melt before the

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[50] *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654, affirmed in 131 F. 2d 518 (C. A. 5).

equipment in which it is placed leaves the State.[51] The goods (ice) produced for such use "enter into the very means of transportation by which the burdens of traffic are borne."[52] The same may be said of electrical energy produced and sold within a single State for such uses as lighting and operating signals on railroads and at airports to guide interstate traffic, lighting and operating radio stations transmitting programs interstate, and lighting and message transmission of telephone and telegraph companies.[53] Similar principles would apply to the production of fuel or water for use in the operation of railroads [fol. 68] with which interstate and foreign commerce is carried on; the production of radio or television scripts which provide the basis for programs transmitted interstate; the production of telephone and telegraph poles for use in the necessary repair, maintenance, or improvement of interstate communication systems; the production of crushed rock, ready-mixed concrete, cross-ties, concrete culvert pipe, bridge timbers, and similar items for use in the necessary repair, maintenance, or improvement of railroad roadbeds and bridges which serve as the instrumentalities over which interstate traffic moves.

Similarly, in the case of highways, pipe lines, and waterways which serve as instrumentalities of interstate and foreign commerce, the production of goods for use in the direct furtherance of the movement of commerce thereon would be the production of goods "for commerce." The production of materials[54] for use in the necessary maintenance,

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[51] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C. A. 4), certiorari denied 317 U. S. 634; *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C. A. 5); *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C. A. 6), certiorari denied 320 U. S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C. A. 6); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 357, 144 P. 2d 896.

[52] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C. A. 4).

[53] *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C. A. 5); see also *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C. A. 2).

[54] *Walling* v. *Staffen*, 5 W. H. Cases 1002 (W. D. N. Y.), 11 Labor Cases (CCH) par. 63, 102; *McComb* v. *Carter*, 8

repair, or improvement of the instrumentality so that the flow of commerce will not be impeded or impaired is an example of this. Thus, stone or ready-mixed concrete, crushed rock, sand, gravel and similar materials for bridges or dams; like materials or bituminous aggregate or oil for road surfacing; concrete or galvanized pipe for road drainage; bridge planks and timbers; paving blocks; and other such materials may be produced "for" commerce even [fol. 69] though they do not leave the State.

(3) This does not, however, necessarily mean that the production of such materials within a State is always production "for" commerce when the materials are used in the same State for the maintenance, repair, or improvement of highways or other instrumentalities carrying interstate traffic. In determining whether the production is actually "for" commerce in a situation where there is no reason to believe that the goods will leave the State, a practical judgment is required. Some illustrations may be helpful.

On the one hand, there are situations where there is little room for doubt that the goods are produced "for" commerce in the sense that the goods are intended for the direct furtherance of the movement of commerce over the instrumentalities of transportation and communication. The most obvious illustration is that of special-purpose goods such as cross-ties for railroads, telephone or telegraph poles, or concrete pipe designed for highway use. Another illustration is sand and gravel for highway repair or reconstruction which is produced from a borrow pit opened expressly for that purpose, or from the pits of an employer whose business operations are conducted wholly or in substantial part with the intent or purpose of filling highway contracts. The fact that a substantial portion of the employer's gross income is derived from supplying such materials for highway repair and reconstruction would be one indication that a substantial part of his business is directed to the purpose of meeting such needs of commerce.

W. H. Cases 498 (E. D. Va.) 16 Labor Cases (CCH) par. 64, 964. Contra, *McComb* v. *Trimmer*, 85 F. Supp. 565 (D. N. J.). Cf. *Engebretson* v. *Albrecht*, 150 F. 2d 602 (C. A. 7).

[fol. 70] On the other hand, there are situations where materials or other goods used in maintaining, repairing, or reconstructing instrumentalities of commerce are produced and supplied by local materialmen under circumstances which may require the conclusion that the goods are not produced "for" commerce. Thus, a materialman may be engaged in an essentially local business serving the usual miscellany of local customers, without any substantial part of such business being directed to meeting the needs of highway repair or reconstruction. If, on occasion, he happens to produce or supply some materials which are used within the State to meet such highway needs, and he does so as a mere incident of his essentially local business, the Administrator will not consider that his employees handling or working on such materials are producing goods "for" commerce. This is, rather, a typically local activity of the kind the Act was not intended to cover. The same may be said of the production of ice by an essentially local ice plant where the only basis of coverage is the delivery of ice for the water cooler in the community railroad station. The employees producing ice in the ice plant for local use would not by reason of this be covered as engaged in the production of goods "for" commerce.

Other illustrations might be given but these should emphasize the essential distinction which must be kept in mind. Borderline cases will, of course, arise. In each such case the facts must be examined and a determination made as to whether or not the goods may fairly be viewed as produced "for" use in the direct furtherance of the movement of interstate or foreign commerce, and thus "for" commerce.

[fol. 71]

Appendix III

Pertinent Statutory Provisions

Extract From Provisions of Fair Labor Act of 1938 and Fair Labor Standards Amendments of 1949

Section 3 (b) prior to amendment—

Sec. 3. As used in this Act—

* * * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

Section 3 (b) as amended—

Sec. 3. As used in this Act—

* * * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

Section 3 (j) prior to amendment—

Sec. 3. As used in this Act—

* * * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner [fol. 72] working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 3 (j) as amended—

Sec. 3. As used in this Act—

* * * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Section 7(a) as amended—

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is en-

gaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11 (c) not amended—

Sec. 11.

* * * * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him [fol. 73] and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Section 15 (a) (2) and (5) as amended—

Sec. 15 (a) After the expiration of ninety days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

Section 17 as amended—

Sec. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for [fols. 74-80] cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

[fol. 81] PETITION FOR REHEARING

To the Honorable the Judges of the Court of Appeals for the Third Circuit:

The opinion of this Court, filed April 9, 1952, affirms the judgment of the District Court, and it is respectfully urged that reargument be granted to consider the following:

1. The so-called "ice cases" upon which the Court appears to predicate its opinion that Alstate's off-the-road employees are engaged "in the production of goods for commerce" do not support such an unprecedented extension of coverage.

2. The judgment of the District Court, as affirmed, is so sweeping as to cover even those of defendant's employees whose activities are totally unconnected with interstate commerce.

This Court is respectfully referred to the accompanying brief.

Respectfully submitted, Samuel A. Schreckengaust, Jr., McNees, Wallace & Nurick, Twelfth Floor, Commerce Building, Harrisburg, Pa.

[fol. 82] CERTIFICATE

Samuel A. Schreckengaust, Jr., of counsel for Alstate Construction Company, petitioner herein, does hereby certify that the foregoing is presented in good faith and not for delay.

Samuel A. Schrechengaust, Jr.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

PETITION FOR SUPERSEDEAS PENDING APPEAL

To the Honorable, the Judges of the Court of Appeals for the Third Circuit:

The petition of Alstate Construction Company, appellant, by Samuel A. Schreckengaust, Jr., Esquire, of McNees, Wallace & Nurick, its attorneys, respectfully represents:

1. Alstate Construction Company has appealed from judgment rendered in the above-captioned matter by the United States District Court for the Middle District of Pennsylvania which provides, inter alia, as follows:

> (1) Defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for a workweek longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half time the regular rate at which he is employed.

2. Appellant has contended, and still contends, that the decision of the United States District Court is not only [fol. 84] contrary to the provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U.S.C. Title 29, Sec. 201, et seq.) as amended, but contrary to prior decisions, particularly insofar as such decisions apply to appellant's "off-the-road" employees.

3. In order to comply with the provision of the judgment as aforesaid, appellant will be required to pay additional compensation immediately to many of its employees unless

a supercedeas pending appeal be allowed, and appellant believes that if payment of such additional compensation be required pending disposition of the appeal, and if the judgment of the United States District Court be reversed, appellant will sustain irreparable loss as a result of the practical impossibility of recovering from its employees, many of whom are not permanent, such additional compensation.

4. Appellant proposes to set up a special bank account into which it will deposit all such additional compensation which may become payable to employees under the judgment of the lower court, pending disposition of this appeal, and the Government, by its attorneys, has indicated its consent, as appears more fully in Exhibit A attached hereto and incorporated herein by reference.

Wherefore, appellant prays your Honorable Court for a supersedeas pending disposition of its appeal, without bond.

(S.) Samuel A. Schreckengaust, Jr. of McNees, Wallace & Nurick, Commerce Building, 300 North Second Street, Harrisburg, Pennsylvania.

[fol. 85]

CONSENT

In consideration of the averments made in the foregoing petition and of the willingness of Alstate Construction Company, Appellant, to deposit all additional compensation which may become due to its employees under the judgment of the United States District Court, dated March 30, 1951 in the matter of Maurice J. Tobin, Secretary of Labor, United States of America v. Alstate Construction Company, Civil Action No. 3189, the said Maurice J. Tobin, Secretary of Labor, United States of America, Appellee, by its attorneys hereby consents to the granting of supersedeas pending appeal as prayed for, without bond.

(S.) William S. Tyson, Ernest N. Votaw, Louis Weiner.

[fol. 86] AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, ss:

Personally appeared before me a Notary Public, in and for the said state and county, John Grenoble who being duly sworn according to law, deposes and says that he is President of Alstate Construction Company; that the averments of fact contained in the foregoing petition for supercedeas pending appeal are true; and, that he is authorized by the corporation to make this affidavit.

(S.) John W. Grenoble.

Sworn to and subscribed before me, this 3rd day of May, A.D. 1951. (S.) May A. Rynard, Notary Public.

My commission expires January 29, 1955.

[fol. 87] [Endorsed:] In the United States Court of Appeals for the Third Circuit. No. 10464. Maurice J. Tobin, Secretary of Labor, United States Dept. of Labor v. Alstate Construction Company, Appellant. Received & Filed May 3, 1951. Ida O. Creskoff, Clerk.

[fol. 88] [Stamp:] Received & Filed May 8, 1951, Ida O. Creskoff, Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

ORDER

Present: Biggs, Chief Judge, and Maris and Staley, Circuit Judges.

And Now, to wit, this 8th day of May, 1951, it is Ordered that supersedeas be and the same hereby is granted to the appellant, Alstate Construction Company,

upon the filing of its own bond in the sum of $250.00, without surety.

For the Court, John Biggs, Jr., Chief Judge.

[fol. 89] [Stamp:] Received & Filed June 29, 1951, Ida O. Creskoff, Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

STIPULATION FOR EXTENSION OF TIME

And Now, this 23rd day of June, 1951, it appearing that due to vacation schedules, counsel for the Appellee will be unable to complete Appellee's Brief in the above matter within the time limit fixed by the Rules of Court, it is hereby stipulated and agreed that time for filing of Appellee's Brief and Supplemental Appendix (if any) be extended until August 20, 1951.

William S. Tyson, Solicitor; Bessie Margolin, Assistant Solicitor; William A. Lowe, Attorney; Ernest N. Votaw, Regional Attorney; Louis Weiner, Supervisory Attorney; United States Department of Labor Attorneys for Appellee.

Samuel A. Schreckengaust, Jr., McNees, Wallace & Nurick, Attorneys for Defendant, Appellant.

Approved: William H. Hastie, Circuit Judge, June 29, 1951.

[fol. 90] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued November 16, 1951

Before Maris, Kalodner and Staley, Circuit Judges

OPINION OF THE COURT—Filed April 9, 1952

By KALODNER, Circuit Judge:

Where an employer is engaged in the production and application of a bituminous material used in the repair and maintenance of highways over which interstate commerce moves, are those off-the-road employees who perform work essential to the production of the material "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938?

The question is presented by the instant appeal from the judgment of the District Court for the Middle District of Pennsylvania enjoining violations by Alstate Construction Company ("Alstate") of Sections 15(a)(2)[1] and [fol. 91] 15(a)(5)[2] of the Act, 52 Stat. 1060, as amended, 29 U.S.C. § 201 et seq. The facts are stated in detail in the

[1] Prohibiting violations of the minimum wage and maximum hour provisions of the Act.

[2] Prohibiting violations of the record-keeping provision of the Act.

opinion of the court below, 95 F. Supp. 585 (1951). They may be summarized as follows:

Alstate is engaged in the production, sale, distribution and application of a bituminous concrete material, known as amesite, which is used to resurface and repair streets, highways, railroad crossings and industrial facilities. The material is processed at three plants, located in Pennsylvania, and then applied by Alstate's employees. During the period under consideration (June 30, 1945, through June 30, 1948) over eighty-five per cent of the material was used (1) on interstate roads or roads carrying interstate traffic, or (2) by interstate railroads or industrial concerns producing and shipping goods in interstate commerce. Alstate employs various classes of employees at its plants and at the site of its operations. Laborers rake the amesite on the highways; at the plants, off-the-road employees, including mixers, firemen, watchmen and clerks, perform tasks essential to the production of the material. Most of these employees are regularly employed in excess of forty hours per week without receiving overtime wages, in violation of the Act;[3] prior to January 1, 1948, Alstate failed to keep proper records as required by regulations promulgated under the Act.[4] This action was brought by the

[3] Section 7(a) of the Act provides:

"No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of (forty) the hours . . . at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a).

[4] Section 11(c) of the Act provides:

"Every employer . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order . . ." 29 U.S.C. §211(c). See also 29 C.F.R. Part 516.

[fol. 92] Administrator[5] to enjoin continued violations. In the proceedings below, most of the facts were stipulated by the parties, and additional testimony was submitted. The District Court concluded "that the various plants of the defendant were all component parts of an integrated unit, eighty-five and one-half per cent of whose total output was directed toward the improvement of various interstate facilities, and that all of the employees of the defendant are definitely within the scope of the statute."

Alstate concedes that those of its employees who actually apply the amesite to the highways or other instrumentalities of commerce are within the scope of the Act; but contends that its off-the-road employees, i.e., the mixers and other plant employees who produce the amesite, do not have such immediacy of participation in interstate commerce so as to bring them within its coverage. We cannot subscribe to this contention.

While the precise question has never been passed upon by an appellate court,[6] analysis of the language of the

[5] The Secretary of the Department of Labor was substituted as a party plaintiff by stipulation.

[6] E. C. Schroeder Co., Inc. v. Clifton, 153 F.(2d) 385 (10th Cir. 1946), relied upon by Alstate, is not in point. It involved the application of the Act to employees engaged in the production, at the quarry, of rock which was later used on railroad and highway projects. However, the segments of railroad and highway on which the rock was used were not part of existing systems, but were new segments, not yet dedicated to use in interstate commerce and clearly beyond the contemplation of the Act. Kelly v. Ford, Bacon & Davis, Inc., 162 F.(2d) 555 (3rd Cir. 1947).

The District Courts which have considered the problem have not been in agreement. See, for example, McComb v. Trimmer, 85 F. Supp. 565 (D.N.J. 1949). *Contra:*, McComb v. Carter, Civil No. 745, E.D., Va., July 31, 1948 (16 Labor Cases § 69,964). The point was considered in Walling v. Craig, 53 F. Supp. 479, 483 (D. Minn. 1943), and decided in favor of Alstate's position. However, this was before the Administrator's assertion, based upon the Circuit Court decisions in the so-called "ice cases" (see footnote 7 *infra*), that these employees were covered. See 29 C.F.R. §776.21 (b) (1950 Supp. 149).

Supreme Court in recent cases arising under the Act leads inevitably to the conclusion that coverage was intended for off-the-road employees such as are here involved. By its terms, the Act applies to all employees "engaged in commerce or in the production of goods for commerce". This [fol. 63] clause was construed by the Supreme Court, in Roland Electrical Co. v. Walling, 326 U.S. 657, 663 (1946):

> "This does *not* require the employee to be directly 'engaged in commerce' among the several states. This does *not* require the employee to be employed even in the production of an article which *itself* becomes the subject of commerce or transportation among the several states. It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other 'articles or subjects of commerce of any character' which are produced for trade, commerce or transportation among the several states."

The Supreme Court has also held:

> "Vehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce." Overstreet v. North Shore Corp., 318 U.S. 125, 129 (1943).

Applying these principles, we are of the opinion that Alstate's off-the-road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce, are engaged "in the production of goods for commerce". The same rationale was employed by the Court of Appeals for the Fifth Circuit in Atlantic Co. v. Walling, 131 F.(2d) 518 (1942), in holding that the Act applied to employees who manufactured ice to refrigerate railroad cars transporting other commodities in interstate commerce, the ice being consumed in transit; and in Lewis v. Florida Power & Light Co., 154 F.(2d) 751 (1946), in which it was held that an employer engaged in the production of goods for commerce by furnishing elec-

[fol. 94] tricity to others who used it to transmit interstate messages and in the operation of interstate facilities.[7]

With respect to Alstate's contention that the sweep of the injunction is too broad in that it covers all of Alstate's employees, including those engaged in original construction and private projects unconnected with interstate commerce, it is answered by the very language of the injunction. The latter applies only to those "engaged in interstate commerce or in the production of goods for commerce, *within the meaning of the Act*". (emphasis supplied). The District Court found that, during the period involved, none of Alstate's work on interstate facilities involved original construction, and that there was no segregation of work performed by the off-the-road employees. In doing so it specifically held, and properly so, that "original construction is definitely beyond the contemplation of the Act." As long as any individual employee spends a substantial part of the work-week in commerce or in the production of goods for commerce, he is entitled to the full beiefits of the Act. Southern California Freight Lines v. McKeown, 148 F.(2d) 890 (9th Cir. 1945). At present, all of Alstate's employees fall into this category.

For the reasons stated, the judgment of the District Court will be affirmed.

A true Copy:

Teste:

——— ———, Clerk of the United States Court of Appeals for the Third Circuit.

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[7] See also Hamlet Ice Co. v. Fleming, 127 F.(2d) 165 (4th Cir. 1942), cert. denied, 317 U.S. 634; Chapman v. Home Ice Co. of Memphis, 136 F.(2d) 353 (6th Cir. 1943), cert. denied, 320 U.S. 761.

[fol. 95] [Stamp:] Received & Filed April 9, 1952, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: Maris, Kalodner and Staley, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest: Ida O. Creskoff, Clerk.

April 9, 1952

[fol. 96] [Stamp:] Received & Filed May 5, 1952, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FO THE THIRD DISTRICT

No. 10,464

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Defendant-Appellant

Sur Petition for Rehearing

Present: Maris, Kalodner and Staley, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court: Harry E. Kalodner.

Dated: May 5, 1952.

[fol. 97] [Stamp:] Received & Filed May 13, 1952, Ida O. Creskoff, Clerk.

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Middle District of Pennsylvania, Greeting:

Whereas, lately in the United States District Court for the Middle District of Pennsylvania, before you or some of you, in a cause between Maurice J. Tobin, Secretary of Labor, United States Department of Labor, Plaintiff, (Appellee) and Alstate Construction Company, Defendant, (Appellant)—Civil Action No. 3189—a judgment was entered in the District Court on March 30, 1951, which judgment is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought

into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Alstate Construction Company agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And Whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

April 9, 1952

[fol. 98] You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 13th day of May in the year of our Lord one thousand nine hundred and fifty-two.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

Civil Action No. 3189. No. 10,464. Maurice J. Tobin, Secretary of Labor, United States Department of Labor vs. Alstate Construction Company, Appellant.

Copy Mandate. Received & Filed May 13, 1952, Ida O. Creskoff, Clerk.

[fol. 99] [Stamp:] Received & Filed Aug. 11, 1952, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,464

MAURICE J. TOBIN, Secretary of United States Department of Labor

v.

ALSTATE CONSTRUCTION COMPANY, Appellant

ORDER

The Clerk of this Court is hereby authorized to transmit to the Clerk of the Supreme Court of the United States the complaint and the defendant's answer, which were filed in this Court as part of the record on appeal in the above-entitled case.

Mafis, Circuit Judge.

August 11, 1952

[fol. 100] Clerk's Certificate to foregoing. Transcript omitted in printing.

[fol. 101] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. —

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 29, 1952.

Harold A. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 11th day of July, 1952.

[fol. 95] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 8, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.